MOTION FILED
AUG 18 1976

No. 75-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

BRUNSWICK CORPORATION, *Petitioner,*

v.

PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS and HOLIDAY BOWL-O-MAT, INC., *Respondents.*

MOTION FOR LEAVE TO FILE AN OPPOSITION TO MOTION OF PUREX CORPORATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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Come now The Procter & Gamble Company and The Clorox Company, by their undersigned counsel, pursuant to Rules 35 and 42 of the Rules of this Court, and ask leave to file the annexed Memorandum In Opposition to the Motion of Purex Corporation for Leave to File a Brief *amicus curiae* in this case, or, in the alter-

native, to file such Memorandum as a Reply Brief *amicus curiae.*[1]

Purex seeks to be heard in this case on the ground that, like respondents, it is a plaintiff in an action for treble damages under Section 7 of the Clayton Act. Movants, The Procter & Gamble Company and The Clorox Company, are the defendants whom Purex is suing. They thus have a vital interest in whatever Purex has to say about that action, and believe that the concise Memorandum they seek leave to file will aid the Court in passing on the Purex Motion and in considering Purex's Brief *amicus curiae,* if it is accepted for filing.

Respectfully submitted,

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[1] Consent of the parties to the filing of this Memorandum was requested but not given.

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MEMORANDUM IN OPPOSITION TO MOTION OF PUREX CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OR, IN THE ALTERNATIVE, REPLY BRIEF AMICUS CURIAE

STATEMENT OF INTEREST

The Procter & Gamble Company and The Clorox Company, defendants in the treble damage action brought by Purex, urge that the Court deny Purex leave to file a brief *amicus curiae* in this case. The apprehensions that apparently led Purex to seek leave to file such a brief were recently realized when the United States District Court for the Central District of California following a non-jury trial and in a comprehensive analysis of a lengthy record entered judgment for

Procter and Clorox on the ground that Purex had failed at trial to prove its allegations. (*Purex Corp.* v. *Procter & Gamble Co.,* CCH Trade Reg. Rep. ¶ 60,985, July 23, 1976.)

Purex may appeal this decision to the Court of Appeals for the Ninth Circuit, and it is of course possible that the matter may ultimately come before this Court. Meanwhile, however, the pending motion must be recognized as an effort by Purex to persuade this Court to include in its decision in the instant case language that will lend support to an effort by Purex to reverse the adverse judgment it has suffered. The Purex motion fails to state adequate grounds for *amicus* participation here. In addition, the intervening opinion of the District Court requires Purex to overcome numerous factual findings supported by substantial evidence before it will even become necessary for the Court of Appeals to decide whether the instant case bears in any way on Purex's claims. Finally, Purex's proposed *amicus* brief fails to inform the Court of the facts to which Purex would apply the language it seeks, or of the anticompetitive consequences of the standard of Section 7 recovery that it asks the Court to promulgate.

ARGUMENT

1. The very considerations put forth by Purex in urging acceptance of its brief make clear that its intrusion in this matter is wholly unwarranted. Purex's basic position is that the facts presented in the instant case "are certainly atypical." (Purex Motion, p. 3) It goes on to say that

> "Such unique facts make it difficult to arrive at a general standard for private recovery of injuries caused by illegal acquisitions." (*Id.*)

Nonetheless, Purex proceeds for some 30 pages to urge that the Court do precisely that, wholly without regard to the facts in the instant case or to the facts underlying Purex's own claim.

The stated pretext for Purex's effort to influence the Court to say something that would provide aid and comfort in advancing its claim is its concern that the Court, without its help, may not appreciate the relationship between the two questions on which certiorari has been granted in this case. It may be fairly assumed, however, that there is nothing special about this case that would impair the Court's abilities, with the assistance of counsel for the parties, to discern the relationship between the questions comprehended in the writ that has issued.

It is apparent, however, that Purex is not genuinely concerned with sorting out the questions presented for review in this case. What it asks the Court to do, despite "the unique nature of the immediate dispute" (Purex Brief, p. 17), is to articulate general standards of recovery applicable to all damage actions under Section 7. It is thus clear that the brief Purex would put before the Court is not designed to assist in the resolution of the instant case and should be rejected on that ground alone.

2. The issuance of the District Court's opinion in *Purex Corp.* v. *Procter & Gamble Co., supra,* subsequent to the filing of Purex's motion herein, has substantially diminished any likelihood that a decision in this case will affect Purex's efforts to recover damages from Procter and Clorox. That opinion first adopts the rule stated in *Gottesman* v. *General Motors Corp.,* 414 F.2d 956, 961 (2d Cir. 1969), *i.e.,* that private dam-

ages may be recovered under Section 7 only if the threat to competition that resulted in the violation "ripens into reality." The resulting judgment for the defendants is based on the court's factual conclusions that Clorox's continuing marketing success was not attributable to its acquisition by Procter, while

> "[t]he comparative inferiority of Purex in marketing liquid bleach stemmed principally from decisions of its own management, rather than having been imposed by Clorox." CCH Trade Reg. Rep., ¶ 60,985 at 69,361.[1]

The decision of the Court of Appeals in the instant case was referred to only briefly and tangentially by the District Court. It observed, in response to Purex's heavy reliance on that decision, that if a passage in that opinion "may be inferred to apply to a situation in which the only causal relationship between the violator's presence in the market and the claimed injury is the plaintiff's fear of the violator's prospective competition, I cannot accept the proposition." (CCH Trade Reg. Rep. ¶ 60,985 at 69,373). In support of this conclusion the District Court reasoned:

> "The doctrine urged by the plaintiff would encourage a competitor, when challenged by a merger, to develop or simulate an attitude of fear and do nothing in the hope of recovering damages for loss of profits that he would have refrained from trying to earn. If the merger is ultimately upheld, the timid competitor has lost much needed ground to his rival. On the other hand, if damages are recovered, they are either a windfall or an unprecedented reward for being fainthearted. In either event, the concept of a cause of action for damages occasioned by fear of a business rival is contrary to the long established principle that the public interest is best served when the challenge of strong competition is met head-on." (*Id.*)

[1] The District Court also rejected an argument that Purex's national expansion plans were frustrated by the acquisition as "an after-thought, induced by the contemplation of this litigation" (*id.* at 69,361), and held that defendants had not violated the Sherman Act. (*Id.* at 69,373).

In no event will this issue be reached on appeal unless Purex persuades the Ninth Circuit that the District Court's factual findings on such questions as credibility, causation, and impact are clearly erroneous. Only then would it become necessary for the Court of Appeals to determine whether and how to apply such holding as results from this Court's consideration of the instant case. Purex's interest in the case at bar is therefore remote and contingent at best.

3. As may be seen from the foregoing passages from the District Court's decision rejecting Purex's claims against Procter and Clorox, Purex's basic position is that Section 7 of the Clayton Act should shield it from normal competition from a company acquired in violation of Section 7. In short, it would have this Court reject the established principle that "competition based on efficiency is a positive value that the antitrust laws strive to protect." *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 623 (1975). And, by indirection, it would also have this Court ignore its observation in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962), that "the legislative history [of Section 7] illuminates congressional concern with the protection of *competition*, not *competitors* . . . ." (Emphasis in the original.) The

interpretation of the antitrust laws advanced by Purex would plainly "stand the public interest on its head and . . . suggest that the public would be better off if the plaintiff found itself without competition." Areeda, *Antitrust Violations Without Damage Recoveries,* 89 Harv. L. Rev. 1127, 1134 (1976) (criticizing the Third Circuit's decision in the instant case). It is submitted that under no circumstances could it have been intended by Congress that the treble damage provisions of the antitrust laws be so applied.

CONCLUSION

The Court should deny Purex's motion for leave to file a brief *amicus curiae.* If that motion is granted this Memorandum should be accepted as a reply brief *amicus curiae.*

Respectfully submitted,

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